

Due sevice of the within Supplemental Brief
is hereby acknowledged this _____ day of
November, A. D. 1938.

Attorneys for Respondents.

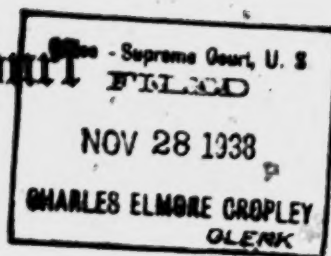
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In the Supreme Court

OF THE
United States

OCTOBER TERM, 1938

No. 210



THE PULLMAN COMPANY (a corporation),
H. J. HATCH, EDWARD E. MYERS and
A. J. KASH,

Petitioners,

vs.

MRS. GARNETT V. JENKINS and ROBERT W.
JENKINS, by Mrs. Garnett V. Jenkins!
Guardian Ad Litem,

Respondents.

SUPPLEMENTAL BRIEF FOR PETITIONER,

A. J. KASH.

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SUPPLEMENTAL BRIEF FOR PETITIONER,

A. J. KASH.

STATEMENT OF THE CASE.

On April 19, 1938, the majority of the Circuit Court of Appeals for the Ninth Circuit reversed the judgment of the Federal District Court in this action, and ordered the cause remanded to the State Court for lack of Federal jurisdiction (96 Fed. (2d) 405; Tr. p. 144). The merits of

the appeal received no consideration. For this reason, the petition for certiorari was almost entirely concerned with the question of jurisdiction. We believe that the supporting brief adequately covers this question.

REASON FOR FILING THIS BRIEF AND SCOPE THEREOF.

The Pullman Company has filed a supplemental brief on the merits. We concur in the views expressed therein. However, we find it necessary to file this brief on behalf of petitioner Kash, because we look at this case from a slightly different viewpoint. We believe that the appeal is disposed of by one very simple statement, viz.: that there was a dismissal for a consideration; that such dismissal is a retraxit of the cause of action and effectually disposes of the entire controversy. In addition, there is one point which concerns petitioner Kash alone. It is that he and the other defendants were joint tortfeasors, so that a release of the Southern Pacific Company and Dolsen released Kash.

In the brief in support of the petition for certiorari the only statements made concerning the effect of the dismissal were, first, that Circuit Judge Mathews, the only Circuit Judge who considered the case on the merits, adopted the opinion of District Judge Yankwich and held that there had been a release of a joint tortfeasor; second, that the most recent California decision on the subject had conclusively sustained the views of these two judges (*Lewis v. Johnson*, 93 Cal. App. Dec. 638, 80 Pac. (2d) 90). Since our supporting

brief was filed, the Supreme Court of California has granted a hearing of *Lewis v. Johnson*, so that this decision is again at large. However, the *Lewis* case does state the law of California, which must be applied to the case at bar. On the other hand, the fact that the *Lewis* case has been reopened necessitates a further consideration of the question whether there was a release of a joint tortfeasor. We will also argue the corollary proposition that Kash and the Southern Pacific Company were joint tortfeasors.

STATEMENT OF THE FACTS.

On September 27, 1935, Mrs. Garnett V. Jenkins and Robert W. Jenkins, respectively the widow and son of Robert L. Jenkins, deceased, commenced this action against the Southern Pacific Company, The Pullman Company, A. J. Kash, H. J. Hatch, and two John Does (Edward E. Myers and Fred M. Dolsen). The case was thereafter removed to the Federal District Court, and two amended complaints were filed. The first count of the various complaints alleged "a cause of action against the defendants and each of them" (Tr. p. 55), charging that Southern Pacific Company, The Pullman Company, Myers and Dolsen negligently permitted Kash to board a train in a drunken condition, and that Kash deliberately assaulted the deceased, thereby causing his death (Tr. pp. 55-64). The second counts were against Kash alone, charging him with the same assault (Tr. pp. 64-68). In the prayer plaintiffs asked judgment "on their first cause of action against the defendants and each of them" for the sum of \$50,000.00, and on their second cause of action,

against Kash alone, for the same amount (Tr. p. 68). Issue was joined and the case was set for trial.

Upon the day set, defendants The Pullman Company, Hatch and Myers pleaded in bar that plaintiffs and Southern Pacific Company had entered into an agreement under which the cause of action pleaded in the complaint had been compromised and settled and the Southern Pacific Company released, and that this settlement and release likewise released the answering defendants. Kash filed substantially the same plea, but alleged additionally that the action had been voluntarily dismissed as to defendants Southern Pacific Company and Dolsen for the sum of \$2500.00, and that this dismissal released all defendants. Kash further stated that the money had been paid as compensation for the death of Robert W. Jenkins by defendants Southern Pacific Company and Dolsen and that in consideration of said payment plaintiffs had voluntarily dismissed the action (Tr. pp. 97-103).

It was then stipulated that the court should forthwith take evidence on the pleas in bar (Tr. p. 116). Defendants thereupon offered in evidence four documents, all of which had been executed after the commencement of the action (Tr. pp. 116-124). These were: (a) a so-called covenant not to sue, (b) a petition in the Probate Court for confirmation of this document and for the leave to dismiss the action as against the Southern Pacific Company, (c) a probate order confirming the settlement agreement and the dismissal, and (d) a dismissal signed by plaintiffs' attorneys, reading as follows:

You will enter the dismissal of the above action against the defendants Southern Pacific Company and Fred M. Dolsen. (Tr. p. 123)

Upon this dismissal the District Judge had endorsed an order reading:

It is so ordered: Leon R. Yankwich, Judge (Tr. p. 124). *No evidence was offered by plaintiff.* The court sustained the pleas in bar and the action was dismissed.

ARGUMENTS OF PETITIONER KASH.

POINT I.

The dismissal for a valuable consideration, signed by counsel for the plaintiffs and by the District Judge, constituted a retraxit of the cause of action, and was therefore a release of all defendants.

POINT II.

All of the defendants named in the complaint were joint tort feassors.

POINT I.

THE DISMISSAL FOR A CONSIDERATION WAS A RELEASE OF A JOINT TORT FEASOR. THIS RELEASED ALL DEFENDANTS.

While the action was pending, the Southern Pacific Company and Dolsen paid plaintiffs \$2500.00 and plaintiffs signed a voluntary dismissal. The District Judge likewise dismissed the action. Although there were other preliminary steps, such as the covenant not to sue and the approval of the Probate Court, they all culminated in a dismissal by court and counsel executed for a valuable consideration.

The order of the District Judge distinguishes this case from the ordinary case, wherein the plaintiff files a voluntary dismissal pursuant to Subdivision (1) of Section 581 of the California Code of Civil Procedure. A dismissal signed by the judge is a dismissal with prejudice, or a retraxit. This is demonstrated by contrasting *Chetwood v. California National Bank*, 113 Cal. 414, wherein the judge signed an order of dismissal and a judgment thereon was entered, with *Lamb v. Herndon*, 97 Cal. App. 193, wherein there was a mere request for dismissal signed by plaintiff's attorney. The former was held to be with prejudice and the latter was held to be without prejudice.

However, far more important than the form of the dismissal, is the fact that money was paid for it pursuant to a settlement agreement. Such a dismissal is not the equivalent of a discontinuance, non-suit, or voluntary dismissal without prejudice.

A judgment of dismissal entered into by agreement of the parties, pursuant to a compromise or settlement of the controversy, is a judgment on the merits, *barring another action for the same cause*, being in effect *a retraxit*.¹

34 *Corpus Juris* 787:

A dismissal for a consideration is a retraxit, and a retraxit in turn is a release. Therefore the dismissal effectually terminated plaintiff's action as against all joint tort feorsors.

These rules are firmly established in California. Thus in *Urton v. Price*, 57 Cal. 270, an action was brought

1. Italics throughout are the writer's.

against Price, a lecturer, and his sponsor, the Mechanics' Institute, for injuries caused by a chemistry lecture explosion. During the pendency of the action, plaintiff, for a consideration of \$500, signed an instrument similar to the so-called covenant not to sue in the case at bar, and filed a stipulation that the cause had been settled and that the action was discontinued and dismissed as to the Mechanics' Institute. A judgment of dismissal was thereafter entered. The court held that Price, the joint tortfeasor, was released from liability.

In *Chetwood v. California National Bank*, 113 Cal. 414, an action was pending against three joint tortfeasors. Two of them paid plaintiff the sum of \$27,500, and plaintiff executed a stipulation wherein plaintiff

• • • hereby renounces and withdraws his cause of action herein as against the said defendants, and that *he will not further prosecute the same*; • • • That, pursuant to the foregoing renunciation and withdrawal by the plaintiff of his said cause of action, *this action be, and is hereby, dismissed against the said defendant.* (p. 423)

An order of dismissal was filed and judgment entered thereon. The California Supreme Court held that the third joint tortfeasor was released by the stipulation and dismissal. The court said:

While plaintiff may sue one or all of joint tortfeasors, and while he may maintain separate actions against them, and cause separate judgments to be entered in such actions, he can have but one satisfaction. Once paid for the injury he has suffered, by any one of the joint tortfeasors, his right to proceed further against the others is at an end. Where sev-

eral joint tort feasons have been sued in a single action, a *retraxit of the cause of action in favor of one of them operates to release them all*. The reason is quite obvious. By his withdrawal, plaintiff announces that he has received satisfaction for the injury complained of, and it would be unjust that he should be allowed double payment for the single wrong. It matters not, either, whether the payment made was in a large or in a small amount. If it be accepted in satisfaction of the cause of action against the one, it is in law a satisfaction of the claim against them all.

In the case at bar it is disclosed that, after the court had awarded a single judgment, not in separate amounts, but in a lump sum, against the three defendants jointly charged, who were thus found to be jointly liable, the plaintiff accepted from two of them the sum of twenty-seven thousand five hundred dollars for and on account of the injury and loss which the the corporation had sustained, and a judgment of dismissal in their favor was accordingly entered. That this judgment, entered under the stipulation of the parties, was equivalent to a *retraxit* there can be no doubt under the case of *Merritt v. Campbell*, 47 Cal. 542. (pp. 426, 427)

Flynn v. Manson, 19 Cal. App. 400, was a case in which plaintiff, in consideration of \$250, signed a settlement agreement with one of the defendants, after which a judgment of dismissal was entered in favor of that defendant. The case is important because the agreement sought to reserve plaintiff's cause of action against the other defendants, in the same manner as the so-called covenant not to sue in the case at bar. The court held that such a reservation was repugnant to the legal effect of the

transaction, and that all the joint tort feasons were released.

Bogardus v. O'Dea, 105 Cal. App. 189, was an action against three joint tort feasons for false representations. Plaintiff had dismissed the action as against two of the defendants. Since the appeal came up on the judgment roll alone, the upper court presumed that the dismissal was for a consideration (p. 193). The court held:

According to the allegations of the original complaint, all three of the defendants joined in the commission of the tort, giving rise to this cause of action, and hence a retraxit of the cause of action in favor of any of them acted as a release of all of them. (p. 192)

In *Johnson v. Pickwick Stages*, 108 Cal. App. 279, plaintiff voluntarily dismissed the action as against one of the joint tort feasons, but since no consideration was given for the dismissal, it was held to be a mere without prejudice dismissal, and not a retraxit. However, the court said: —

If the dismissal had been entered in consideration of the payment to Johnson by Snyder of any sum as compensation for his injuries, it would operate as a retraxit and would bar his right to proceed against the appellant. The proof offered fell short of this. (p. 285)

In *Abbott v. Goodyear Tire Co.*, 116 Cal. App. 665, the dismissal was based upon a stipulation with the respondents, wherein the defendant agreed to pay \$3000 if respondents failed to recover judgment against another defendant. A judgment was recovered and the court therefore held that no consideration was paid for the dismissal. But the court said:

No consideration was paid for the dismissal. This promise of the tire company was not accepted by respondents in full or any satisfaction of the injuries . . . and the dismissal of the company was nothing more than an agreement not to sue which is not alone a release of either joint tortfeasor If the dismissal had been entered in consideration of the payment to respondents of any sum as compensation for the injuries, it would have barred their right to proceed against appellant. (Johnson v. Pickwick Stages, supra.) (p. 669)

Bee v. Cooper, 217 Cal. 96 was an appeal from a judgment of Judge Yankwich when he was sitting on the California Superior Court. While the action was pending, plaintiffs entered into a "settlement agreement" with some of the defendants,

. . . whereby in consideration of said five defendants paying over to a trustee the respective portions or percentage of the money and other property received by them . . . the plaintiff agreed to settle and dismiss this action as to said defendants. (p. 99)

The action was thereafter dismissed as to these defendants.

The exact language of the agreement was as follows:

As and when any of said parties of the second part (defendants) shall pay or deliver to said trustee that which is required of him hereunder *this action shall be dismissed* as to such party, but nothing herein contained shall in any manner prejudice the prosecution of said pending action or of any other action against any other defendant herein or against any other person who may be liable on account of the matters therein complained of. (p. 100)

This is nothing more than a covenant to dismiss without prejudice. In our case Judge Yankwich said concerning the document in *Bee v. Cooper*:

I think the instrument under consideration has more of the earmarks of a release than the one which was before me in *Bee v. Cooper*, supra, and comes clearly within the principles laid down in that case and other cases discussed. (17 Fed. Supp. 820-830)

The California Supreme Court held:

The dismissal was on the merits and intended to settle the differences and obligations between the parties growing out of the cause of action set forth in the complaint. It is well settled that a release of one or two or more joint tort feorsors operates as a release of all. (pp. 99, 100)

On May 27, 1938, the California District Court of Appeal decided the case of *Lewis v. Johnson*, 93 Cal. App. Dec. 638. We take the liberty of analyzing this opinion at some length, not only because it is the most recent pronouncement of a California court on this subject, but also because the facts are almost identical with those of the case at bar. *Lewis v. Johnson* was a malpractice action wherein plaintiff joined as defendants the two doctors who treated him, the hospital in which he was treated, and the superintendent of nurses of the hospital. During the pendency of the action, plaintiff, in consideration of the payment of \$6000, entered into a so-called "covenant not to sue and covenant not to sue further" with the hospital and superintendent. The language of this covenant is almost identical with that of the settlement agreement in the case at bar, even to the statement that "the undersigned does not in any manner or respect waive or relinquish any claim or claims" against other parties (p.

640). Thereupon plaintiff's attorney requested the clerk to enter a dismissal of the action against the two defendants, and in open court announced that such a dismissal had been filed (our case has the additional feature of a judgment of dismissal ordered by the judge). The court held that there was a retraxit of the cause of action and that the remaining defendants were released. It stated:

It is clear that each of the elements necessary for retraxit are present in the instant case. Plaintiff's attorney, Mr. Fritz, in open court, after the action had been commenced, voluntarily dismissed the cause of action against the defendants Seaside Hospital of Long Beach and Miriam Furlong. The document denominated "Covenant Not to Sue and Covenant Not to Sue Further" is mere surplusage, in view of the uncontradicted evidence which discloses that all of the elements necessary for a retraxit were present (p. 642).

The court further said:

The attempted reservation of a cause of action against the remaining defendants was ineffectual and void. It is settled that a retraxit as to one joint tortfeasor releases all of the joint tortfeasors. (*Bogardus v. O'Dea*, 105 Cal. App. 189) * * * irrespective of the attempted reservation of a cause of action against some of the tortfeasors, and regardless of the intention of the parties (*Flynn v. Manson*, 19 Cal. App. 400, 403) (p. 642).

In the case at bar, Judge Yankwich demonstrated that the settlement agreement and other documents also evidenced a release. Such a holding was unnecessary. Regardless of what documents were signed or what attempted reservations there may have been, there was an order

of dismissal and a dismissal for a consideration. This constituted a retraxit or release. Therefor any settlement documents were either mere surplusage or an ineffectual effort to escape the legal effect of a retraxit.

POINT II

ALL OF THE DEFENDANTS WERE JOINT TORT FEASORS.

District Court Judge Yankwich pointed out in his opinion that the first count of the second amended complaint (Tr. p. 55) was against all the defendants, including defendant Kash. The violations of duty consisted of the negligent failure of the defendants, with the exception of Kash, to stop a drunken man from boarding the train and conducting himself in a tortious manner, and the alleged assault by defendant Kash. Thus the cause of action was based on the concurrence of different wrongful acts producing a single, indivisible injury. Furthermore, the first count alleged "a cause of action against the defendants and each of them" and the prayer of this count was likewise "against the defendants and each of them" (Tr. pp. 55, 68). Judge Yankwich, therefore, concluded:

While there is a different violation alleged as to each of the several defendants, the cause of action is based upon the same assault upon the deceased. The cause of action is stated jointly against all of the defendants, and the death which resulted is traceable to the acts of all. (17 Fed. Supp. 820, 823)

The second count was an action of assault against Kash alone, and was joined with the first count under California Code of Civil Procedure Sections 379, 379a, 379b.

The same amount of damages was asked under both counts. The ~~second~~ ^{second} count was held by the District Judge to be a mere restatement as to Kash of the identical tort set forth in the first count. The court said:

There is no negligence charged in the second cause of action, as Kash is charged merely with the doing of a certain act—assault. The first cause of action is based upon the same assault. But the defendants are tied to it by allegations of failure to do certain acts, or failure to prevent the assault. Each party is sought to be held because there was an assault of one man, for which the others became liable.

We have exactly the same situation as in an automobile accident, wherein the driver of an automobile does a negligent act, and that negligence is imputed to the owner of the automobile because he is the owner or has allowed the driver to drive the car. However, it is still the same cause of action. I think therefore, that there is but one cause of action and that several parties contributed to it in various manners. But what determines the joint, or joint and several liability, is the fact that it arises out of a single state of facts, to which each of the defendants is related, in some manner, some as employers, some as agents or employees, some as common carriers, and some in other or different capacities. The situation is akin to other joint torts, such as libel. The person who composes the libel is liable because he wrote it; the editor of the newspaper which prints the libel is liable because he permitted it to be published, as is also the owner of the newspaper. Still there is *one* joint or joint and several liability, although each may be held liable upon a different theory of liability.

My summary of the pleading would be that the theory of liability differs as between the several de-

defendants, some being held on one theory, and some on another, but that the cause of action is essentially the same, that is, a tort. A tort indulged in by one person and for which the others are sought to be bound by reason of their failure to prevent it when it was their duty to do so. Ultimately, the assault is the basis of the right of action. And that was, of course, the same in both causes of action. (17 Fed. Supp. 823, 824)

One quotation from a recognized authority should suffice to demonstrate the correctness of this holding. We quote from Cooley on Torts, 4th Edition, p. 279:

The rule seems to have become generally established that, although there is no concert of action between tort feasons, if the cumulative effect of their acts is a single, indivisible injury, which it cannot certainly be said would have resulted but for the concurrence of such acts, the actors are to be held liable as joint tort feasons.

The authorities are uniform to the effect that where several defendants so act as to cause a single injury, although there is no unity of action, they are jointly liable for the resultant damage. It is not necessary that the wrongful acts shall be contemporaneous.

It is well established law that the original wrongful act may be so continuous that the action of a third person precipitating the disaster will in law be regarded as not independent but as joining with the original act to produce the accident. (Citing cases.) The mere fact that one of several concurring causes may not have been reasonably anticipated is not enough to shield from liability him who sets in motion the other, for it is well settled that the negli-

gence complained of need not be the sole cause of the injury.

Sawdey v. Producers Milk Co., 107 Cal. App. 467, 480.

Two entirely independent acts which result in injury may constitute the actors joint tort feorsors. Thus in *Hillman v. Newington*, 57 Cal. 56, the plaintiff was entitled to the flow of 400 inches of water. The defendants severally diverted water from the stream so that plaintiff's flow was diminished to a quantity less than 400 inches. Although the appropriation of each defendant was insufficient to cause such diminution, the court nevertheless held that the defendants were joint tort feorsors and could properly be joined as defendants in one action.

Each of them diverts some of the water. And the aggregate reduces the volume below the amount to which the plaintiff is entitled, although the amount diverted by any one would not. It is quite evident therefore, that without unity or concert of action, no wrong could be committed; and we think that in such a case, all who act must be held to act jointly. (p. 64)

In *Merrill v. Los Angeles G. & E. Co.*, 158 Cal. 499, a gas company was charged with negligence in repairing a leak. Another defendant was charged with negligence because of the manner in which a stove was lighted by him. The two were held to be joint tort feorsors.

So in the case at bar, Kash is charged with assault and the other defendants are charged with negligence in placing the deceased in a position in which the assault might occur. The two wrongs concurred to cause the decedent's death. If there had been no negligence in

permitting Kash to board the train the deceased would not have died. If there had been no assault by Kash, the deceased would not have died. The acts and neglects which caused the death necessarily and proximately contributed to the unfortunate result. Therefore all of the defendants were joint tort feorsors.

CONCLUSION.

It is conclusively established in the law of California that:

(1) A judgment of dismissal, or a dismissal for a consideration, is a retraxit, and a retraxit is a release inuring to the benefit of all joint tort feorsors.

(2) Where the acts of several defendants combine to cause a single, indivisible injury, such defendants are joint tort feorsors.

It is therefore respectfully submitted that the judgment of the District Court should be affirmed.

Dated, San Francisco, California,
November 23, 1938.

Respectfully submitted,

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